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Paper No. 9
HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Creative Wraps, Inc.

Serial No. 75/696,887

Norman E. Lehrer for Creative Wraps, Inc.

Elliot S.A. Robinson III, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Quinn, Chapman and Wendel, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Creative Wraps, Inc. has filed an application to register the mark RAYA SUN for "clothing, namely, girls and ladies shorts, tops, dresses and bathing suits."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the mark RAY SUN and design, as depicted

[1] Serial No. 75,696,887, filed May 3, 1999, claiming a first use date and first use in commerce date of January 25, 1999.

below, which is registered for "clothing, namely, vests, sweaters, jeans, pants, coats, visors, hats, caps and aprons; sportswear and activewear, namely, T-shirts, shorts, jackets, swimsuits, sweatshirts, sweatpants, tennis wear and shoes."[2]

The refusal has been appealed and both applicant and the Examining Attorney have filed briefs. No oral hearing was requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont*[3] factors which are relevant in view of the evidence of record. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods or services with which the marks are being used. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); In re

[2] Registration No. 1,639,142, issued March 26, 1991; Section 8 affidavit accepted. The drawing is lined for the color red.
[3] In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999).

Looking first to the goods involved here, we find that not only are the goods all items of wearing apparel, as noted by the Examining Attorney, but also there is a definite overlap in the actual items of applicant and registrant. Both include the identical items shorts and bathing suits as well as the closely related items tops and T-shirts. The registration is unrestricted and thus would encompass both girls and ladies items of these types.

Applicant has raised no argument that the goods are other than closely related. Thus, for purposes of comparison under Section 2(d) we consider the goods involved to be partially identical, and otherwise closely related wearing apparel items.

Furthermore, because there are no restrictions in the application or registration as to the channels of trade, the goods of each must be assumed to travel in all the normal channels of trade. See Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Thus, we assume both applicant's and registrant's wearing apparel would travel in all the normal channels of travel for these goods and, as a result, would be available to the same purchasers in the same retail outlets.

It is well accepted that the greater the degree of similarity of the goods, the lesser the degree of similarity in the marks which is necessary to conclude that there will be a likelihood of confusion. See Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). Turning to the marks involved here, we are guided by the well established principle that although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In particular, it is the word portion of a mark, rather than the design element, unless particularly distinctive, that is more likely to be remembered and relied upon by purchasers in referring to the goods and thus it is the word portion that will be accorded more weight in determining the similarity of the marks. See Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A., 32 USPQ2d 1192 (TTAB 1994); In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

Applying these general principles, we are in agreement with the Examining Attorney that it is the literal portion of registrant’s mark, RAY SUN, which is the

dominant portion and, as such, is substantially the same in appearance, sound and connotation as applicant's mark RAYA SUN. While applicant argues that registrant's mark is primarily the word RAY with the word SUN being in such fanciful lettering that it does not immediately convey to purchasers the word SUN, we are convinced that when seen in the red lettering for which the mark is lined, the presence of the word SUN would be obvious. Moreover, we think this is a case wherein a major function of the design element in registrant's mark, particularly, the rays emanating from the word sun, would be to reinforce the impression of the RAY coming from the SUN, in other words, being a RAY of the SUN. See Ceccato v. Manifatture Lane Gaetano Marzotto & Figli S.p.A., *supra* (coat of arms design reinforces meaning of word mark). As such, the commercial impression created by registrant's mark is highly similar to that of applicant's mark RAYA SUN.

Furthermore, since applicant is seeking to register its mark in a typed drawing, applicant is free to adopt any format it desires to display its mark, including a design very similar to that of registrant. See Squirto v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); INB National Bank v. Metrohost Inc., 22 USPQ2d 1585 (TTAB 1992). In attempting to visualize possible forms of

applicant's mark, we can certainly look to the specimens of record which show presentation by applicant of the word SUN in red lettering, although not in the design format of registrant's mark. See Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971). All in all, the design features of registrant's mark cannot be relied upon to obviate the similarity of overall commercial impressions created by the marks.

Accordingly, on the basis of the close relationship of the clothing items of applicant and registrant, the common trade channels and purchasers for these goods, and the similarity of overall commercial impressions created by applicant's and registrant's mark, we find confusion likely with the contemporaneous use of the respective marks for the recited goods.

Decision: The refusal to register under Section 2(d) is affirmed.